

FILE COPY X

54-57

Nos. 1162, 1163, 1164, and 1165

U.S. - Bureau of Prisons, U.S.
DEPT. OF JUSTICE
MAY 1 1947
RECEIVED
U.S. DEPT. OF JUSTICE

In the Supreme Court of the United States

OCTOBER TERM, 1946

HARRY BLUMENTHAL, PETITIONER

v.

UNITED STATES OF AMERICA

LAWRENCE B. GOLDSMITH, PETITIONER

v.

UNITED STATES OF AMERICA

SAMUEL S. WEISS, PETITIONER

v.

UNITED STATES OF AMERICA

ALBERT FEIGENBAUM, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITIONS FOR WRITS OF HABEAS CORPUS TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE NINTH
CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

INDEX

	Page
Opinions below.....	2
Jurisdiction.....	2
Questions presented.....	2
Statutes involved.....	3
Statement.....	3
Argument.....	7
Conclusion.....	13
Appendix.....	14

CITATIONS

Cases:

<i>Baker v. United States</i> , 156 F. (2d) 386, certiorari denied, October 28, 1946, No. 484, O. T. 1946.....	8
<i>Chevillard v. United States</i> , 155 F. (2d) 929.....	11
<i>Galatos v. United States</i> , 80 F. (2d) 15, certiorari denied, 297 U. S. 711.....	10
<i>Gebardi v. United States</i> , 287 U. S. 112.....	12
<i>Glasser v. United States</i> , 315 U. S. 60.....	10
<i>Kotteakos v. United States</i> , 328 U. S. 750.....	9
<i>Marz v. United States</i> , 86 F. (2d) 245.....	9
<i>McKnight v. United States</i> , 252 Fed. 687.....	12
<i>Meyers v. United States</i> , 94 F. (2d) 433 certiorari denied, 304 U. S. 583.....	9
<i>Old Monastery Company v. United States</i> , 147 F. (2d) 905, certiorari denied, 326 U. S. 734.....	12
<i>Oliver v. United States</i> , 121 F. (2d) 245 certiorari denied, 314 U. S. 666.....	9
<i>Silkworth v. United States</i> , 10 F. (2d) 711, certiorari denied, 271 U. S. 664.....	9
<i>Taub v. Bowles</i> , 149 F. (2d) 817, certiorari denied, 326 U. S. 732.....	11
<i>Thomas v. United States</i> , 156 Fed. 897.....	12
<i>United States v. Borden Company</i> , 308 U. S. 188.....	11
<i>United States v. Di Orio</i> , 150 F. (2d) 938, certiorari denied, 326 U. S. 771.....	11
<i>United States v. Falcone</i> , 311 U. S. 205.....	9
<i>United States v. Gilliland</i> , 312 U. S. 86.....	11
<i>United States v. Katz</i> , 271 U. S. 354.....	12
<i>United States v. Kertess</i> , 139 F. (2d) 923, certiorari denied, 321 U. S. 795.....	11

Cases—Continued

	Page
<i>United States v. New York Great Atlantic and Pacific Tea Co.</i> , 137 F. (2d) 459, certiorari denied, 320 U. S. 783.....	9
<i>United States v. Pecoraro</i> , 115 F. (2d) 245, certiorari denied, 312 U. S. 685.....	10
<i>United States v. Rosenberg</i> , 150 F. (2d) 788, certiorari denied, 326 U. S. 752.....	10
<i>United States ex rel Semel v. Fitch</i> , 66 F. Supp. 206.....	12
<i>United States v. Serpico</i> , 148 F. (2d) 95.....	12
<i>United States v. Von Clemm</i> , 136 F. (2d) 968, certiorari denied, 320 U. S. 769.....	10
<i>Vannatta v. United States</i> , 289 Fed. 424.....	12
<i>Warsower v. United States</i> , 312 U. S. 342.....	11
Statutes:	
Section 37, Criminal Code, 18 U. S. C. 88.....	14
Emergency Price Control Act, 56 Stat. 23, 58 Stat. 632, 59 Stat. 306, 50 U. S. C. App., Supp. V, 901 <i>et seq.</i> :	
Section 4 (a).....	14
Section 204 (c).....	12, 15
Sherman Act, 26 Stat. 209, 15 U. S. C. §1.....	12
Miscellaneous:	
H. Rep. No. 827, 79th Cong., 1st Sess.....	12

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1162

HARRY BLUMENTHAL, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1163

LAWRENCE B. GOLDSMITH, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1164

SAMUEL S. WEISS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1165

ALBERT FEIGENBAUM, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE NINTH
CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The original opinion of the Circuit Court of Appeals (R. 482-498) is reported at 158 F. (2d) 883. The denial of the petitions for rehearing and the dissenting opinion of Judge Denman have not yet been reported. Judge Denman's dissenting opinion may be found at page 499 of the record.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 16, 1946 (R. 505). The petitions for rehearing were denied February 28, 1947 (R. 505). The petitions for writs of certiorari were filed March 26, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See Rules 37 (b) (2) and 45 (a) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether there was evidence of a single conspiracy to sell whiskey at over-ceiling prices.
2. Whether the trial court erred in admitting the acts and declarations of each of the alleged conspirators against all of them.
3. Whether the trial court erred in admitting certain extra-judicial admissions made by petitioners Goldsmith and Weiss.

4. Whether a conspiracy to violate the Emergency Price Control Act may be prosecuted under Section 37 of the Criminal Code (18 U. S. C. 88).

STATUTES INVOLVED

The pertinent sections of the Emergency Price Control Act and the provisions of Section 37 of the Criminal Code are set forth in the Appendix, *infra*, pp. 14-17.

STATEMENT

Petitioners, together with one Abel, were tried below on an indictment charging conspiracy to violate the Emergency Price Control Act by selling whiskey at over-ceiling prices (R. 3). All pleaded not guilty (R. 11, 21). Petitioner Blumenthal moved to quash the indictment on numerous grounds, including the contention that it was not a violation of Section 37 of the Criminal Code to conspire to violate the Emergency Price Control Act (R. 16-19). The motion was denied (R. 21).

The evidence introduced by the government against petitioners may be summarized as follows:

Petitioners Goldsmith and Weiss were partners operating the San Francisco Distributing Co. (hereinafter called Francisco). The necessary wholesaler's basic permit had been issued to Goldsmith (R. 244). None of the other alleged conspirators had been issued a basic permit (R. 246). During December 1943 two cars of Old Mr.

Boston Rocking Chair Whiskey were received by Francisco and the cases of whiskey contained therein were stored, released, and delivered by the San Francisco Warehouse Company in accordance with the orders of Weiss (R. 251-254). At the time Weiss first arranged for delivery by the Warehouse Company, he turned over to it some of the invoices for sales already made to the tavern keepers described below. Goldsmith arranged for the payment of the sight drafts for the whiskey from Francisco's bank. (R. 267-268.)

The whiskey was disposed of by a uniform procedure. Government witnesses testified to transactions with Abel, Feigenbaum, Blumenthal, an unidentified person at the offices of Francisco, and unidentified salesmen. Some of the key transactions, including that by Feigenbaum and one of those by Blumenthal, occurred prior to Francisco's receipt of the carloads of whiskey (R. 323, 362). All the sales followed a consistent pattern:¹ A tavern owner was informed by a visitor to his shop or by a person to whom he had complained of his need for whiskey that he could have some. He was instructed by the negotiator to make out a check to Francisco, the price always being calculated at \$24.50 per case, which was below the ceiling price of \$25.27 (R. 438). (Sales

¹ This repeated picture was developed in the testimony of Norman Reinburg, Giometti, Figone, Cernusco, Mr. and Mrs. Taylor, Humes, Vogel, Duffy, Lombardi, Fingerhut, and Travis (R. 278-380).

were generally made in units of 100 to 200 cases.) An additional cash payment was required by and delivered to the negotiator, but the record offers no light on the money's ultimate disposition. This side payment brought the total price to \$55 to \$65 a case. Sometime later the whiskey was delivered. Either before or at delivery, Francisco's invoice for the whiskey at \$24.50 a case was given to the purchaser. The check cleared through Francisco's bank account and Francisco, for its participation, received \$2 a case, shared by Weiss and Goldsmith equally (R. 381).

The testimony of the tavern keepers brought out other salient facts. A good deal of the evidence revolved around the Sportorium, a sporting goods store in the vicinity of Market and Third Streets in San Francisco. The transactions in which Blumenthal participated took place there and the shop was apparently Blumenthal's headquarters (R. 354, 359, 362, 373). Abel asked to be dropped and picked up at that shop when he was brought to the city by one of the buyers (R. 282), as did one of the unidentified salesmen (who said he was from Francisco) (R. 302). Abel was also seen entering the shop (R. 283).

At the other focal point of the conspiracy, Francisco's place of business, an unidentified person participated in a sale which did not deviate from the pattern outlined above (R. 296-299). Moreover, an unidentified salesman in

another one of the transactions had in his possession and delivered to the buyer the warehouse release slip from the warehouse in which the whiskey was stored (R. 351-352). Two of the buyers testified that the person approaching them about the liquor had called himself Weiss and Weiss's name appeared as a notation on invoices delivered (R. 295, 299, 302). The Feigenbaum transaction, similar to the others, took place at his drug store (R. 316-342).

It appeared further that the use of the facilities of Francisco, a licensed wholesaler, was indispensable to the conspiracy, as the tavern keepers would buy only when they were furnished with invoices for their records (R. 285, 292).

In addition to the buyers, who testified to the above facts, Harkins, a special investigator for the Alcohol Tax Unit, told of conversations he had had with petitioners Goldsmith and Weiss, in which they both admitted that they received \$2 a case for their share in the repeated sales of the whiskey, and Goldsmith admitted that he had made out some of the invoices in the transactions involved. They also intimated to Harkins that they had never owned the liquor (R. 380-390).

The evidence of each transaction was initially received only against the defendant concerned in it. At the close of all the testimony, the Government moved to admit all of the evidence against

each of the defendants (R. 390). The motion was granted, except as to the Harkins' testimony, the relevant portions of which were admitted only against Goldsmith and Weiss, respectively (R. 398, 417). and a caution as to this limitation was repeated in the instructions (R. 434). The defendants neither took the stand nor presented any testimony. Motions for directed verdict, new trial, and in arrest of judgment by some or all of the petitioners were denied (R. 30, 45). All the defendants were found guilty (R. 32). All were fined \$1,000; Feigenbaum, Abel and Blumenthal were also sentenced to eight months imprisonment, Goldsmith and Weiss to two months (R. 47-56).

Upon appeal, the Circuit Court of Appeals for the Ninth Circuit affirmed, holding that there was evidence from which the jury could properly have inferred, beyond a reasonable doubt, that there was a conspiracy and that it was a single unified conspiracy, and finding further there was no error in the admission of testimony or in the instructions (R. 482-498). A petition for rehearing was denied, Circuit Judge Denman dissenting, and withdrawing his assent to the original opinion, on the ground that the evidence showed only several separate conspiracies (R. 500-504).

ARGUMENT

1. There was ample evidence from which a jury could properly have inferred a single conspiracy

in which all the petitioners participated and in which all had knowledge of the conspiracy. See statement, *supra*. The facts point to a unified scheme to dispose of the liquor at black-market prices and to use the facilities of Francisco in so doing. Petitioners were not independent operators; they were co-workers. *Baker v. United States*, 156 F. (2d) 386 (C. C. A. 5), certiorari denied October 28, 1946, No. 484, October Term 1946. All the so-called "salesmen" operated in almost identical fashion and almost simultaneously. The liquor was drawn from the same two carloads. The incidents were not isolated and unconnected. There was affirmative evidence of connection between the various participants. It was not mere chance that at least three of them (petitioner Blumenthal, Abel and one unidentified salesman) were found at or visited the Sportorium. It is significant, too, particularly in relation to Goldsmith's and Weiss's participation in and knowledge of the conspiracy, that the sale on the premises of Francisco did not deviate from the pattern of the other sales, that some of the sales were made in the name of Weiss, and that one of the invoices given by Weiss to the warehouse was the Duffy invoice (R. 258), which was used in the sale to Duffy by an unidentified salesman (R. 348-352). Moreover, it should be noted that some of the sales by those who negotiated with the tavern keepers were made prior to the receipt of the carloads.

This is not a situation in which Goldsmith and Weiss sold whiskey to buyers who subsequently sold it illegally. Cf. *United States v. Falcone*, 311 U. S. 205. The whole picture is that of a single, integrated illegal enterprise in which all petitioners were engaged. See *United States v. New York Great Atlantic and Pacific Tea Co.*, 137 F. (2d) 459, 463 (C. C. A. 5), certiorari denied, 320 U. S. 783; *Oliver v. United States*, 121 F. (2d) 245, 248 (C. C. A. 10), certiorari denied, 314 U. S. 666; *Silkworth v. United States*, 10 F. (2d) 711, 717 (C. C. A. 2), certiorari denied, 271 U. S. 664. *Kotteakos v. United States*, 328 U. S. 750, upon which petitioners rely, is therefore inapplicable.

2. The assertion of error, by all the petitioners, in the admission of the acts and declarations of all the co-conspirators against each of them is also rebutted by the evidence outlined in the Statement and Argument.² The rule requires only that some

² The related argument by petitioner Feigenbaum, that the court improperly refused his requested instruction No. 27 (R. 458) to the effect that the jury could not consider acts of other persons in determining the existence of the conspiracy and his connection therewith (Br. No. 1165, 53-56), misconceives the rule. The existence of a conspiracy may be established by any evidence, and when the existence of a conspiracy has been shown, only slight quantitative evidence connecting a defendant therewith is sufficient to justify submission of the case to the jury. *Meyers v. United States*, 94 F. (2d) 433, 434 (C. C. A. 6), certiorari denied, 304 U. S. 583; *Marx v. United States*, 86 F. (2d) 245, 250 (C. C. A. 8);

connection be shown, otherwise than by the disputed evidence, between the conspiracy and the defendant against whom the evidence is being admitted. *Glasser v. United States*, 315 U. S. 60; *United States v. Von Clemm*, 136 F. (2d) 968 (C. C. A. 2), certiorari denied, 320 U. S. 769; *United States v. Rosenberg*, 150 F. (2d) 788 (C. C. A. 2), certiorari denied, 326 U. S. 752. Feigenbaum and Blumenthal each separately demonstrated his own connection with the general conspiracy, by his own acts in telling the buyer to prepare, and in accepting, the check and the side cash payment for Francisco and in transmitting Francisco's invoice to the buyer. See *United States v. Pecoraro*, 115 F. (2d) 245 (C. C. A. 2), certiorari denied, 312 U. S. 685.

The required showing for petitioners Goldsmith and Weiss is found in their conclusion of the arrangements for receipt and storage of the whiskey, in their preparation of invoices below ceiling price in a time of overwhelming demand for liquor and in their receipt of a flat \$1 a case apiece for their participation. And, as stated above, their participation as "legitimate" wholesalers was indispensable to the success of the conspiracy. It is significant that the trial judge waited until the close of the Government's evidence in *Galatas v. United States*, 80 F. (2d) 15, 24 (C. C. A. 9), certiorari denied, 297 U. S. 711. Here, as shown in the text, Feigenbaum's participation in the conspiracy was established by his own acts.

dence before allowing the testimony to be used against all the defendants.

3. The admission of the Harkins testimony was not error under the rule as to extra-judicial admissions announced in *Warszower v. United States*, 312 U. S. 342, as petitioners Goldsmith and Weiss contend. The evidence summarized in the Statement, *supra* offers the necessary corroboration as to the existence of the conspiracy. The corroborating evidence need not, independently, prove the conspiracy beyond a reasonable doubt. *United States v. Di Orio*, 150 F. (2d) 938 (C. C. A. 3), certiorari denied, 326 U. S. 771; *United States v. Kertess*, 139 F. (2d) 923 (C. C. A. 2), certiorari denied, 321 U. S. 795; *Chevillard v. United States*, 155 F. (2d) 929 (C. C. A. 9).

4. A conspiracy to violate the Emergency Price Control Act is an offense under Section 37 of the Criminal Code. No repeal of the conspiracy statute can be implied from Section 4 (a) of the Emergency Price Control Act, which makes it a misdemeanor to agree to violate the Act, since there is no clear repugnancy between the old and new statute. *United States v. Gilliland*, 312 U. S. 86; *United States v. Borden Company*, 308 U. S. 188. The existence of different penalties for very similar offenses does not create a repugnancy. *United States v. Gilliland*, *supra*. It has been uniformly held that Congress did not intend to except conspiracies to violate the Act from prosecution under Section 37. *Taub v. Bowles*, 149 F.

(2d) 817 (E. C. A.), certiorari denied, 326 U. S. 732; *United States ex rel Semel v. Fitch*, 66 F. Supp. 206 (D. Conn.). Cf. *United States v. Serpico*, 148 F. (2d) 95 (C. C. A. 2).³

Conclusive evidence of Congress' intent is found in the amendment to Section 204 (e) of the Act, providing that stays of criminal proceedings authorized by that section could be issued in proceedings under Section 37 of the Criminal Code. Sec. 6, Joint Resolution of June 30, 1945, 59 Stat. 306, 308. The Conference Report on that amendment shows unmistakably that it was understood that conspiracies to violate price regulations were subject to Section 37. H. Rep. No. 827, 79th Cong., 1st Sess., pp. 7-8.

Petitioner in No. 1165 presents a different contention: that the conspiracy alleged in the indictment comes within the concert of action rule. See *United States v. Katz*, 271 U. S. 354; *Gebaradi v. United States*, 287 U. S. 112. That principle is limited to the situation in which the very persons required to commit the substantive crime, and they alone, are charged with the conspiracy. *Old Monastery Co. v. United States*, 147 F. (2d) 905 (C. C. A. 4), certiorari denied, 326 U. S. 734; *Thomas v. United States*, 156 Fed. 897 (C. C. A. 8); *McKnight v. United States*, 252 Fed. 687 (C. C. A. 8). Cf. *Vannatta v. United States*, 289 Fed. 424

³ The Sherman Act cases, cited by petitioner in No. 1162, are not relevant, in view of that Act's direct coverage of conspiracies, as such (26 Stat. 209, 15 U. S. C. 1).

(C. C. A. 2). All the conspirators here were sellers; no conspiracy with the buyers is alleged.

CONCLUSION

The decision of the court below is correct and no conflict of decisions is involved. We, therefore, respectfully submit that the petitions for writs of certiorari should be denied.

✓ GEORGE T. WASHINGTON,
Acting Solicitor General.

✓ THERON L. CAUDLE,
Assistant Attorney General.

✓ WILLIAM E. REMY,
Deputy Commissioner for Enforcement.

✓ DAVID LONDON,
Director, Litigation Division.

✓ SAMUEL MERMIN,
Solicitor, Litigation Division.

✓ NORMA G. ZARKY,
*Attorney, Office of Price Administration,
Office of Temporary Controls.*

✓ APRIL 1947.

APPENDIX

Section 37 of the Criminal Code (18 U. S. C. 88):

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than \$10,000, or imprisoned not more than two years, or both.

Pertinent provisions of the Emergency Price Control Act, 56 Stat. 23, 58 Stat. 632, 59 Stat. 306, 50 U. S. C. App., Supp. V, 901 *et seq.*:

SEC. 4. (a) It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing.

SEC. 204. (e) (1) Within thirty days after arraignment, or such additional time as

the court may allow for good cause shown, in any criminal proceeding, and within five days after judgment in any civil or criminal proceeding, brought pursuant to section 205 of this Act or section 37 of the Criminal Code,* involving alleged violation of any provision of any regulation or order issued under section 2 or of any price schedule effective in accordance with the provisions of section 206, the defendant may apply to the court in which the proceeding is pending for leave to file in the Emergency Court of Appeals a complaint against the Administrator setting forth objections to the validity of any provision which the defendant is alleged to have violated or conspired to violate.* The court in which the proceeding is pending shall grant such leave with respect to any objection which it finds is made in good faith and with respect to which it finds there is reasonable and substantial excuse for the defendant's failure to present such objection in a protest filed in accordance with section 203 (a). Upon the filing of a complaint pursuant to and within thirty days from the granting of such leave, the Emergency Court of Appeals shall have jurisdiction to enjoin or set aside in whole or in part the provision of the regulation, order, or price schedule complained of or to dismiss the complaint. The court may authorize the introduction of evidence, either to the Administrator or directly to the court, in accordance with subsection (a) of this section. The provisions of subsections (b), (c), and (d) of this section

*Added by sec. 6 of Joint Resolution of June 30, 1945, 59 Stat. 306, 308.

shall be applicable with respect to any proceeding instituted in accordance with this subsection.

(2) In any proceeding brought pursuant to section 205 of this Act or section 37 of the Criminal Code,* involving an alleged violation of any provision of any such regulation, order or price schedule, the court shall stay the proceeding—

(i) during the period within which a complaint may be filed in the Emergency Court of Appeals pursuant to leave granted under paragraph (1) of this subsection with respect to such provision;

(ii) during the pendency of any protest properly filed by the defendant under section 203 prior to the institution of the proceeding under section 205 of this Act or section 37 of the Criminal Code,* setting forth objections to the validity of such provision which the court finds to have been made in good faith; and

(iii) during the pendency of any judicial proceeding instituted by the defendant under this section with respect to such protest or instituted by the defendant under paragraph (1) of this subsection with respect to such provision, and until the expiration of the time allowed in this section for the taking of further proceedings with respect thereto.

Notwithstanding the provisions of this paragraph, stays shall be granted thereunder in civil proceedings only after judgment and upon application made within five days after judgment. Notwithstanding the provisions of this paragraph, in the case of a proceeding under section 205 (a) the court granting a stay under this paragraph shall issue a temporary injunction.

tion or restraining order enjoining or restraining, during the period of the stay, violations by the defendant of any provision of the regulation, order, or price schedule involved in the proceeding. If any provision of a regulation, order, or price schedule is determined to be invalid by judgment of the Emergency Court of Appeals which has become effective in accordance with section 204 (b), any proceeding pending in any court shall be dismissed, and any judgment in such proceeding vacated, to the extent that such proceeding or judgment is based upon violation of such provision. Except as provided in this subsection, the pendency of any protest under section 203, or judicial proceeding under this section, shall not be grounds for staying any proceeding brought pursuant to section 205 of this Act or section 37 of the Criminal Code;* nor, except as provided in this subsection, shall any retroactive effect be given to any judgment setting aside a provision of a regulation or order issued under section 2 or of a price schedule effective in accordance with the provisions of section 206.

*Added by sec. 6 of Joint Resolution of June 30, 1945, 59 Stat. 306, 308.